Supreme Court, U.S.
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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

**October Term 1997**

JULIA A. CHRISTIANS, TRUSTEE
*Petitioner,*
v.
CRYSTAL EVANGELICAL FREE CHURCH
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Whether the judgment below is correct under the Religious Liberty and Charitable Donation Protection Act of 1998.

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## STATEMENT OF THE CASE

The Trustee in Bankruptcy sued the Church to recover contributions made in good faith by members who subsequently filed for bankruptcy. The Court of Appeals held that the Trustee's claim was barred by the Religious Freedom Restoration Act, 42 U.S.C. §2000bb *et seq.* (1994). That opinion is now reported as *In re Young*, 141 F.3d 854 (8th Cir. 1998) (Pet. App. A1).

The Trustee's claim is based on the former 11 U.S.C. §548(a)(2) (1994). The Religious Liberty and Charitable Donation Protection Act of 1998, signed by the President on June 19, 1998, entirely rewrites §548(a)(2). The new §548(a)(2) unambiguously vindicates the judgment below. The Act is printed in full as an Appendix to this Brief. The Act and much of its legislative history are available on Thomas, the website of the Library of Congress.[1]

Prior to enactment of new §548(a)(2), the Church defended against the Trustee's claim on multiple grounds: that the Trustee and the courts below were misinterpreting

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[1] http://thomas.loc.gov. The Public Law number is not yet available; the enacted bill was S.1244. The text of the bill can be retrieved by searching for this bill number; with the text are links to statements in the Congressional Record, and to a Bill Summary and Status File, which shows each step towards enactment. At the Thomas home page, there is a link to committee reports; House Report 105-556 is the report of the House Committee on the Judiciary on the companion bill, H.R. 2604. Also on the Thomas home page is a link to Committee home pages. At the home page of the House Committee on the Judiciary is a link to hearing testimony, then to the Subcommittee on Commercial and Administrative Law, and then to the testimony at a hearing on H.R. 2604 and H.R. 2611 held on February 12, 1998. The Senate Committee did not file a written report, and the testimony at the Senate hearing does not appear to be available on the Internet.

§548(a)(2) as it then stood, that the Trustee's interpretation of former §548(a)(2) violated the Free Exercise Clause, and that the Trustee's claim was barred by RFRA. The Church may defend the judgment below on any of these grounds.[2] But the judgment below is so clearly correct under new §548(a)(2) that none of these issues can be reached.

## REASONS FOR DENYING THE WRIT

### I. The Judgment Below Is So Clearly Correct Under New Legislation That No Other Question Is Presented.

This case is controlled by the Religious Liberty and Charitable Donation Protection Act of 1998, passed unanimously in both houses of Congress and signed by the President on June 19. This legislation responds to the unprecedented misuse of the Bankruptcy Code by litigation such as the Trustee's unsuccessful claim in this case.

Section 3(a) of the new Act amends 11 U.S.C. §548(a). It renumbers the former paragraph (2) as paragraph (1)(B), and it adds the following as the new §548(a)(2):

> *(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which--*
>
> > *(A) the amount of that contribution does not exceed 15 percent of the gross annual*

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[2] Thigpen v. Roberts, 468 U.S. 27, 29-30 (1984); Washington v. Confederated Bands, 439 U.S. 463, 476 n.20 (1979).

*income of the debtor for the year in which the transfer of the contribution is made; or*

*(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.*

Section 5 makes the Act applicable to any case "that is pending or commenced on or after the date of enactment of this Act." Section 2 defines "charitable contribution" to mean a tax deductible contribution, of cash or financial instruments, to a charity described in §§170(c)(1) or 170(c)(2) of the Internal Revenue Code.

This case is still pending, so the Act applies. The contributions at issue were about ten percent of the donors' income, Pet. App. A3, well below the Act's 15% safe harbor.[3] The contributions consisted of cash, transferred by personal check. Affidavit of Bruce Young at 2. There is no dispute that the contributions were tax deductible and that the Church is an entity described in §170(c)(2) of the Internal Revenue Code. *See* Pet. App. A123-24. All the elements of the new Act are satisfied; indeed, the Act was designed precisely to cover this case and cases like it.

If the Court granted certiorari, it would inevitably affirm under new §548(a)(2) without reaching any of the issues set

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[3] Contributions totaled $13,450 in the year before the petition was filed on February 3, 1992. Pet. App. A104-05. The debtors' gross income in 1991 was $140,000. Statement of Financial Affairs at 1-2. The debtors were forced into bankruptcy by the failure of the husband's business. Affidavit of Bruce Young at 2.

out in the petition, and without reaching any of the other grounds on which the Church could defend the judgment below. The Trustee's claim under former §548(a)(2), the Church's defenses under the Religious Freedom Restoration Act and the Free Exercise Clause, the Trustee's constitutional challenge to the Religious Freedom Restoration Act -- none of these questions could be reached. None of these questions will ever again be presented in the same form or on similar facts, and the questions about the interpretation and validity of former §548(a)(2) will never be presented again at all. The questions previously presented under generally worded and perhaps unclear legislation are now definitively resolved by far more specific legislation.

The new Act protects any charity, religious or secular, described in §170(c)(1) or (c)(2) of the Internal Revenue Code. The Trustee's Establishment Clause argument thus collapses. There is not even arguably a preference for religion or a discrimination between religious and secular charities.

There is no doubt of Congress's power to apply new §548(a)(2) to pending cases. This Court has held, recently and unanimously, that legislatures can act retroactively "to correct the unexpected results" of surprising court decisions. *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). This is such a case. The right of creditors to recover fraudulent transfers has been part of Anglo-American law for more than four hundred years, and transfers for inadequate consideration have been a badge of fraud since the early days of this law. *See, e.g., BFP v. Resolution Trust Co.*, 511 U.S. 531, 540-41 (1994). Yet this law had never been applied to good faith contributions to churches. When the Trustee first filed her claim in this case, there was no

precedent to support the claim and some precedent against it.[4] The Church has consistently argued that the Trustee's interpretation of former §548(a)(2) was incorrect, unconstitutional, and barred by the Religious Freedom Restoration Act. The Trustee never at any time had a final, unappealed judgment in her favor, and she lost twice in the Court of Appeals prior to the new legislation. Pet. App. A1, A30. But the protracted litigation has been expensive for all sides, and some trustees have won such claims in Bankruptcy Courts and District Courts. *See, e.g., In re Newman*, 203 B.R. 468 (D. Kan. 1996). Congress properly acted to clarify the law and to apply that clarification to pending cases.[5]

The appropriate disposition of this case is to deny certiorari. The case is certainly not moot. The Trustee seeks a money judgment; if she were entitled to such a judgment, it could still be entered and enforced. It would be erroneous to vacate the judgment as moot.

It would also be inappropriate to grant, vacate, and remand for consideration in light of the new Act. The new Act fully vindicates the judgment below; it does not raise the slightest possibility that the judgment below is now in error. A GVR requires "a reasonable probability" that the court below might take a different view of an issue that "may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Here, there is no

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[4] In re Moses, 59 B.R. 815 (Bankr. N.D. Ga. 1986); In re Missionary Baptist Foundation, 24 B.R. 973 (Bankr. N.D. Tex. 1982).

[5] *See also* United States v. Carlton, 512 U.S. 26 (1994) (upholding retroactive tax legislation, despite reliance on unambiguous prior rule, unanimously as to the result); McKesson Corp. v. Division of Alcoholic Beverages, 496 U.S. 18, 40 n.23 (1990) (noting validity of modestly retroactive legislation).

possibility that the new Act, clearly intended to vindicate the judgment below, would lead the Eighth Circuit to reach a different result or to take a different view of issues it has already twice decided the same way.

The most nearly analogous precedents are those that dismiss writs of certiorari as improvidently granted when a new statute or development "eliminate[s] the issue or make[s] it unlikely that the question will arise again, at least in the same context," or when decision on the issue originally presented becomes unnecessary because "the judgment below was clearly correct on another ground." Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, *Supreme Court Practice* §5.15 at 260 (7th ed. 1993), citing numerous cases.[6] In none of these cases did the Court vacate the judgment below.

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[6] Cook v. Hudson, 429 U.S. 165 (1976) (dismissing writ where new state statute vindicated plaintiffs' claim and recent decision removed the principal federal objection to that claim); Triangle Improvement Council v. Ritchie, 402 U.S. 497 (1971) (dismissing writ where statute on which plaintiffs' claim was based had been repealed, and newly enacted statute changed the potential impact of the Court's decision); Sanks v. Georgia, 401 U.S. 144 (1971) (dismissing appeal where statute had been repealed and replaced by newly enacted statute that omitted the provisions challenged as unconstitutional); Piccirillo v. New York, 400 U.S. 548 (1971) (dismissing writ after intervening state court decision vindicating petitioner's federal claim as a matter of state law); The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959) (dismissing writ where it appeared that the judgment below was correct on an alternate and simpler ground); Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) (dismissing writ where new state statute vindicated petitioner's claim); *see also* Rogers v. United States, 118 S.Ct. 673 (1998) (dismissing writ where it appeared to majority that judgment below was correct on an alternate ground that made it unnecessary to decide the constitutional issue thought to have been presented).

No matter how important the issues addressed in the opinion below, this Court "reviews judgments, not opinions." *Texas v. Hopwood*, 518 U.S. 1033 (1996) (Ginsburg, J., concurring in denial of certiorari); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). The Church believes that the most recent opinion below is sound. But beyond any possibility of doubt, the *judgment* below is correct under new §548(a)(2).

If the writ had already been granted, new §548(a)(2) would have led to the writ being dismissed as improvidently granted. Because no writ has been granted, new §548(a)(2) means that the writ should now be denied. In this already protracted litigation, the Church should not be subjected to the delay and expense of a further remand that could accomplish nothing whatever except the ultimate re-entry of the same judgment.

## II. Certiorari Should Have Been Denied Even If §548(a)(2) Had Not Been Rewritten.

### A. There Is No Conflict With Decisions of This Court.

The petition makes the wholly insupportable accusation that the Court of Appeals is guilty of "repudiating this Court's decision" in *City of Boerne v. Flores*, 117 S.Ct. 2157 (1997). Pet. 6. Of course the Court of Appeals did no such thing. The Court of Appeals fully adhered to *Boerne*, but correctly concluded that this case presents fundamentally different issues.

*Boerne* was a case about the application of RFRA to state and local law; this was a case about the application of RFRA to federal law. This Court noted the difference at the

very beginning of its analysis: "Congress relied on its Fourteenth Amendment enforcement power in enacting the most far reaching and substantial of RFRA's provisions, those which impose its requirements on the states." 117 S.Ct. at 2162. Congressional power to enact RFRA as to federal law depends not on power to enforce the Fourteenth Amendment, but on powers granted in Article I.

Ignoring these obvious points about the issues presented in each case, the petition relies on out-of-context quotations about separation of powers. This Court said in *Boerne* that RFRA interfered with the Court's authority to interpret the Constitution and thus raised a separation of powers problem. 117 S.Ct. at 2172. But this conclusion was entirely derivative of the Court's interpretation of Congressional power to enforce the Fourteenth Amendment.

*Boerne* held that Congressional enforcement of constitutional rights must be based on the *Court's* interpretation of the underlying right. *Id.* at 2167-68. So when Congress acted to enforce its own interpretation, it simultaneously exceeded the scope of its own delegated power and usurped the Court's authority to interpret the Constitution. Both of these consequences follow from the particular delegated power at issue in *Boerne*, the power to enforce the Constitution.

No one claims that power to enforce the Fourteenth Amendment is the source of Congressional power to enact limits on the reach of the Bankruptcy Code. The power to enact this application of RFRA was based on the Bankruptcy Clause and the Necessary and Proper Clause, U.S. Const., Art. I, §§8[4] and 8[18], powers that *Boerne* had no occasion to address.

All that Congress has done in federal applications of RFRA is to limit the reach of a law that *it* enacted, over which *it* has plenary power. The bankruptcy power is not a power to enforce the Constitution, and an exercise of the bankruptcy power does not depend on anyone's interpretation of the Constitution. Congress could limit the reach of former §548(a)(2) as applied to religious contributions because it believed that such an application would be unconstitutional, or because it believed that such an application would disserve important values of religious liberty that are not embodied in the Religion Clauses, or because it believed that such an application would be bad policy for reasons having nothing to do with constitutional rights or religious liberty. Congress's reasons for acting do not matter. Because RFRA as applied to federal law does not depend on anyone's interpretation of the Constitution, federal applications do not raise the separation of powers issue addressed in *Boerne*.

As one of RFRA's leading academic critics put it:

> [T]o the extent the RFRA itself merely prescribes a rule of construction regarding the manner in which other acts of Congress are to be applied, it is unremarkable. It is simply of no consequence why Congress prescribes a rule specifying how its own statutes are to be applied.

William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 Duke L.J. 291, 294 n.12 (1996).

RFRA as applied to the states was a binding command from a competing sovereign claiming superior authority; it was precisely that claim of superior authority that this Court rejected in *Boerne*. RFRA as applied to federal law is not

a claim of superior authority over anybody. It does not tell the states how to legislate, and it does not tell the courts how to interpret the Constitution. It is a Congressional attempt at self-restraint, applicable only to Congress's own legislation and the implementation of that legislation, and fully subject to amendment or repeal by any future Congress. There is no conflict between *Boerne* and the decision below.

### B. There Is No Conflict With Decisions of Any Other Court of Appeals.

Two courts of appeals have now upheld the constitutionality of RFRA as applied to federal law. *In re Young*, Pet. App. A5-14 (8th Cir. 1998); *EEOC v. Catholic University*, 83 F.3d 455, 469-70 (D.C. Cir. 1996). Both cases rely on the obvious point that Congress can legislate to limit or extend the reach of laws that it has power to enact. Five courts of appeals have considered and correctly rejected Establishment Clause challenges to RFRA.[7]

There is no conflict of appellate authority on either of these issues. In her effort to create the appearance of conflict, the Trustee relies on the disagreement between the opinion below and the dissent below,[8] on decisions of Bankruptcy Courts that show no evidence of having even realized there was an issue about RFRA's application to federal law,[9] and on the absence of dicta in opinions on

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[7] In re Young, Pet. App. A14-19 (8th Cir. 1998); Mockaitis v. Harcleroad, 104 F.3d 1522, 1529-30 (9th Cir. 1997); Sasnett v. Sullivan, 91 F.3d 1018, 1022 (7th Cir. 1996), *vacated on other grounds*, 117 S.Ct. 2502 (1997); EEOC v. Catholic Univ., 83 F.3d 455, 470 (D.C. Cir. 1996); Flores v. City of Boerne, 73 F.3d 1352, 1364 (5th Cir. 1996), *rev'd on other grounds*, 117 S.Ct. 2157 (1997).

[8] Pet. 16 n.3, *citing* Judge Bogue's dissent in this case on one side of the conflict and the majority opinion on the other.

[9] Pet. 16 n.3, *citing* Geltzer v. Crossroads Tabernacle (In re

RFRA's application to state law.[10] The petition even cites two decisions that were subsequently reversed or modified on rehearing, and then cites the reversing and modifying opinions as evidence of a conflict requiring resolution by this Court.[11] The petition is forced to such lengths for the simple reason that there is no actual conflict among the courts of appeals.

### C. The Establishment Clause Issues Would Not Deserve This Court's Review Even If They Were Still Presented.

Nothing in *Boerne* suggests that RFRA violates the Establishment Clause. The City made that argument, but it attracted only one vote. 117 S.Ct. at 2172 (Stevens, J., concurring). The argument confuses the advancement of religious liberty with the advancement of religion, and it is simply not the law.

RFRA exempts religiously motivated conduct from burdensome federal regulation. This Court has unanimously upheld such exemptions against Establishment Clause attack, *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327

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Rivera), 214 B.R. 101, 102 n.1 (Bankr. S.D.N.Y. 1997); In re Andrade, 213 B.R. 765, 772 (Bankr. E.D. Cal. 1997).

[10] Pet. 16 n.3, *citing* Shabazz v. Parsons, 127 F.3d 1246, 1247 n.2 (10th Cir. 1997); Muhammad v. City of New York, 126 F.3d 119, 121 (2d Cir. 1997); Anderson v. Angelone, 123 F.3d 1197, 1198 n.2 (9th Cir. 1997).

[11] Pet 16 n.3, *citing* In re Saunders, 214 B.R. 524, 526 (Bankr. D. Mass. 1997), on one side of the alleged conflict, and In re Saunders, 215 B.R. 800, 803 (Bankr. D. Mass. 1997), on the other; *also citing* In re Hodge, 200 B.R. 884, 898-902 (Bankr. D. Idaho 1996), on one side of the alleged conflict, and Magic Valley Evangelical Free Church, Inc. v. Fitzgerald (In re Hodge), 1998 WL 173065, *6-11 (D. Idaho, April 3, 1998), on the other.

(1987), it affirmatively invited such exemptions in *Employment Division v. Smith*, 494 U.S. 872, 890 (1990), and it reaffirmed the propriety of such exemptions in *Board of Education v. Grumet*, 512 U.S. 687, 705-06 (1994).

RFRA does not require government to subsidize religion, benefit religion, or make religion in any way better off than it would be if government had done nothing. Rather, RFRA requires only that religious conduct sometimes be left unregulated. RFRA is triggered only when federal law imposes a "substantial burden" on a religious practice, 42 U.S.C. §2000bb-1(b) (1994), and it requires only that government justify the burden or refrain from imposing it. The lower courts' interpretation of former §548(a)(2) imposed a substantial burden on innocent churches; RFRA removed that burden and left churches exactly where they would have been if Congress had not enacted former §548(a)(2) in the first place. The net effect was neutral; government had left religion where it found it. Failing to burden religion is not an establishment; government does not establish a religion by leaving it alone.

Exempting religious exercise from burdensome regulation has the secular purpose and effect of protecting liberty. *Amos*, 483 U.S. at 335-37. There is no implied endorsement; a decision to protect religious liberty implies no view about the value of religion in general or of any religion in particular. The avoidance of religious conflict and consequent human suffering, and deference to beliefs that are often far more important to the individual than to the state, are wholly adequate secular reasons for protecting religious liberty.

Exempting religious practice also avoids entanglement between church and state "and effectuates a more complete separation of the two." *Id.* at 339. If the Trustee were to

prevail in this dispute, demands for the return of contributions to churches would become a routine feature of personal bankruptcies. Churches would regularly be parties to litigation in the Bankruptcy Court; trustees would regularly subpoena church contribution records. Bankruptcy courts would have to decide which contributions were in exchange for religious benefits and which were not, because "many religious contributions" would be "'in exchange for' church services," even if the contributions here were not. *In re Young*, Pet. App. A69-71 (8th Cir. 1996) (Beam, J., concurring in denial of rehearing en banc). Worst of all, some churches would become embroiled in collection proceedings, unable to pay the amount of contributions that they have long since spent, and vulnerable to execution, garnishment, discovery of assets, and other coercive proceedings. RFRA avoided all of these entanglements.

RFRA's evenhanded generality serves even more important values of the Establishment Clause. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Congress minimized the risk of denominational preference by enacting a general standard exempting all religious practices from all substantial and unjustified regulatory burdens. RFRA's generality avoids this Court's suspicions of narrow legislative exemptions that benefit only one or a few religious groups. *Compare Grumet*, 512 U.S. at 703 (rejecting an accommodation because of its "anomalously case-specific nature"); *Estate of Thornton v. Caldor*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring) (distinguishing general religious exemptions from exemptions that protect a single religious practice).

The Trustee claims that RFRA was invalid as applied in this case, because it forced creditors to give money to the

debtors' church. The parties fully agree that government cannot coerce support for religion. But plainly that has not happened here.

It was unambiguously the debtors who gave money to the Church. It was the debtors' choice -- not the creditors' and not the government's -- that resulted in money going to the Church. The question is not whether the creditors must support the Church, but whether they can reach inside the Church, reverse a voluntary religious act, and demand that the Church help pay the creditors of a member's failed business.

The creditors extended credit to the debtors or to their business, fully aware that the debtors would control the funds, that debtors dissipate funds in a myriad of ways, and that there was a risk the loans would not be repaid. Creditors charge interest for assuming that risk. The creditors' loss is the same whether the money was dissipated through bad luck, bad business decisions, frivolous consumption, contributions to the Church, or any other way. The creditors have no more been coerced to support the debtors' religious choices than they were coerced to support the debtors' residential or recreational choices. The choice to support the Church was made by the debtors, and the creditors assumed the risk of the debtors' choices.

This Court has recognized the importance of such intervening private choices even in the context of government programs directing tax money to a narrow range of private institutions, many of which turn out to be religious.[12] In the school cases, parental rights to choose

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[12] *See* Agostini v. Felton, 117 S.Ct. 1997 (1997); Rosenberger v. Rector of University of Virginia, 515 U.S. 819 (1995); Zobrest v.

among schools insulated the government's decision to support schools from the parents' decision to direct that support to religious schools. This is an *a fortiori* case, for the debtors' power to spend their own funds prior to bankruptcy extends to every imaginable expenditure in the global economy. The connection between the creditors and any particular expenditure of funds by the debtors is far more attenuated than the connection between the government in the school cases and the parents' decision to use the government funds at religious schools.

Nor was it the case that the creditors would have been legally entitled to this money if only it had not been given to the Church. The opposite is true: the creditors claimed this money *because* it was given to the Church. If the money had not been given to the Church, the odds are high that it would have been spent some other way, in a transaction that produced no benefit for creditors but which the Trustee could not challenge.

### D. The Church Is Entitled to Defend the Judgment on the Basis of Issues That Can Never Arise Again.

The Church has long argued that the Trustee and the courts below misinterpreted former §548(a)(2), and that so interpreted, former §548(a)(2) was unconstitutional. Either of these grounds would be sufficient to support the judgment below, and the Church is entitled to defend the judgment on any ground that will support it.[13] But neither of these

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Catalina Foothills School District, 509 U.S. 1 (1993); Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983).

[13] *See, e.g.*, Thigpen v. Roberts, 468 U.S. 27, 29-30 (1984); Washington v. Confederated Bands, 439 U.S. 463, 476 n.20 (1979).

issues can ever arise again; both are focused on the former §548(a)(2), which no longer applies to charitable contributions.

### 1. The Contributions Were Not Recoverable Under Former §548(a)(2).

Section 548 authorizes the Trustee to recover certain transfers of a debtor's property not in exchange for reasonably equivalent value. Courts have sensibly interpreted "value" to include any thing of value, including entertainment,[14] services,[15] and executory promises.[16]

The Court of Appeals assumed, Pet. App. A46 & n.4, and the Bankruptcy Court found, *id.* at A114 n.7, that the debtors received valuable services from the Church. The Court of Appeals assumed that the value of these services was reasonably equivalent to the contributions. *Id.* at A46 & n.4. But the court concluded that the equivalent value the debtors received from the Church was not "in exchange for" the debtors' contributions. *Id.* at A46-47 (8th Cir. 1996). That is, the courts below believed that the debtors could and should have taken advantage of the Church, consuming its services without contributing to the cost of producing those services.

This interpretation was error.[17] If members

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[14] In re Chomakos, 69 F.3d 769, 772 (6th Cir. 1995).

[15] In re Investors Funding Corp., 523 F. Supp. 533, 549 (S.D.N.Y. 1980).

[16] In re Young, Pet. App. A114-18 (Bankr. D. Minn. 1992) (collecting authorities).

[17] *See* In re Young, Pet. App. A69-71 (8th Cir. 1996) (Beam, J., concurring in denial of rehearing en banc); In re Moses, 59 B.R. 815, 818-19 (Bankr. N.D. Ga. 1986); In re Missionary Baptist Foundation, 24

collectively did not contribute, the Church could not exist, and the debtors would have received no valuable religious services from the Church. The debtors contributed their fair share, calculated in accordance with their understanding of religious obligation, to the cost of services that they valued highly. The congregation and each member received religious services in exchange for the congregation's, and therefore each member's, contributions. This transaction is different in kind from the fraudulent transactions that former §548(a)(2) was designed to detect.

If the debtors had merely *promised* to contribute, the Church's expenditure of funds in reliance on the promise would have made the promise enforceable.[18] Such charitable subscriptions are enforceable in nearly every state, without reliance or with thin or fictional reliance.[19] If reliance on a mere promise to make a charitable contribution creates an enforceable exchange at common law, then *a fortiori*, reliance on a completed charitable contribution is an

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B.R. 973, 979 (Bankr. N.D. Tex. 1982).

[18] Rochester Civic Theatre, Inc. v. Ramsay, 368 F.2d 748, 751 (8th Cir. 1966) (Minnesota law); In re Stack's Estate, 204 N.W. 546 (Minn. 1925); Albert Lea College v. Brown's Estate, 93 N.W. 672 (Minn. 1903).

[19] *See* Restatement (Second) of Contracts §90(2) (1981) (enforceable without reliance); Annotation, *Lack of Consideration as Barring Enforcement of Promise to Make Charitable Contribution or Subscription--Modern Cases*, 86 A.L.R.4th 241 (1991 & Supp.) (collecting cases); John D. Calamari & Joseph Perillo, *The Law of Contracts* §6-2(d) at 279-81 (3d ed. 1987); Arthur Linton Corbin, 1A *Contracts* §198 at 203-13 (2d ed. 1963); Samuel Williston, 1 *A Treatise on the Law of Contracts* §116 at 473-80 (3d ed. 1957); Edith L. Fisch, Doris Jonas Freed, & Esther R. Schachter, *Charities and Charitable Foundations* §63 at 77 (1974).

exchange. Here the debtors made their customary contributions, week after week, and the Church relied in the most emphatic and unambiguous way -- it spent the money on services that the debtors used and valued. The conclusion below that there was no exchange is thus inconsistent with long recognized common law principles.

Two rules of interpretation further highlight the misinterpretation below. First, former §548(a)(2) should not have been interpreted "to disrupt the ancient harmony" of long settled understandings of proper behavior by debtors and creditors. *BFP v. Resolution Trust Co.*, 511 U.S. 531, 543 (1994). Second, no federal law should be interpreted to burden religious exercise in the absence of an affirmatively expressed Congressional intent to impose such a burden. *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). If the courts below had followed these sound rules of interpretation, the Religious Liberty and Charitable Donation Protection Act might never have been necessary.

### 2. The Court of Appeals' Interpretation of Former §548(a)(2) Violated the Free Exercise Clause.

The Court of Appeals' interpretation of former §548(a)(2) turned on the phrase "in exchange for" -- it held that the debtors' contributions were not in exchange for the value the debtors received from the Church. Pet. App. A46-47 (8th Cir. 1996). This interpretation placed contributions to churches in a narrow and disadvantaged class, outside the generally applicable rules of the Bankruptcy Code.

The requirements of the Free Exercise Clause are set out in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and *Employment Div. v. Smith*, 494 U.S. 872 (1990). The threshold requirements of

*Smith* and *Lukumi* are that the law be "neutral" and "generally applicable".

The requirement of "general applicability" is not a motive test; it is a test of objectively "unequal treatment."[20] If a law allows secular exemptions, government must have a compelling reason for not allowing religious exemptions. *Smith*, 494 U.S. at 884.

*Lukumi* applies and expands these principles. *Lukumi* holds that if a regulation applies to religious conduct, and does not apply to similar secular conduct, this discrimination requires compelling justification. *See* 508 U.S. at 535-38, 543-45. Even if the unregulated secular conduct is different from the religious conduct, the law requires compelling justification if the unregulated secular conduct and the regulated religious conduct cause analogous harms. *See id.* at 543 ("The ordinances . . . fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree"); *id.* at 538-39, 544-45 (noting that disposal by restaurants and other sources of organic garbage created the same problems as animal sacrifice).

For similar reasons, the Trustee could not arbitrarily confine the inquiry here to the four corners of former §548(a)(2). She could not prevail with the circular argument that former §548(a)(2) was generally applicable to whatever it applied to. Nor could she just assert that contributions to churches were "different" from other expenditures that take value away from creditors, most of which were outside the scope of former §548(a)(2).

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[20] *Lukumi*, 508 U.S. at 542, quoting *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring); *see Lukumi*, 508 U.S. at 540-42 (Kennedy, J.) (part of opinion based on motive drew only two votes).

Former §548(a)(2) as interpreted below discriminated against religious exercise in multiple ways. At the level of the Church, every membership organization must raise money to support its operations. Secular clubs generally charge dues for membership and fees for services; members who do not pay are excluded. Thus, if the debtors had paid the money at issue to their country club, the Court of Appeals would have recognized the transfer as a payment in exchange for club membership and club services.

The debtors' contributions to their church serve the same economic function for the Church as payments of dues and fees to a country club: they enable the organization to meet its expenses. The difference between the two financing systems has no economic significance in this context, but it has profound religious significance. Churches cannot exclude those who fail to pay; such a policy would eliminate evangelism and charitable works, and thus fundamentally change the mission of most churches. So the Court of Appeals interpreted former §548(a)(2) to apply to religious contributions because of--*solely and precisely because of*--a practice that is essential to the mission and structure of churches.

The Court of Appeals' interpretation of former §548(a)(2) also discriminated against religious exercise at the level of the debtors, creating two sets of rules about what debtors could do with their property in the year preceding bankruptcy. The generally applicable rule in bankruptcy is that debtors control the disposition of their funds prior to bankruptcy. Debtors can and do spend their money in all sorts of ways that produce value to them, but no value to their creditors. Indeed, this pattern of spending is the essence of why debtors go bankrupt.

These other expenditures that produce no value for creditors cause the same harm as contributions to churches -- they dissipate assets that might have been used to pay creditors. But they are not fraudulent transfers recoverable by trustees in bankruptcy, even in extreme cases. Thus, debtors who gamble their money away in casinos have not committed a fraudulent transfer. *In re Chomakos*, 69 F.3d 769 (6th Cir. 1995). Debtors who waste their money on travel, fine meals, alcohol, or prostitutes all receive something in return, and thus have not committed fraudulent transfers. *Id.* at 772. Debtors who foolishly pour more and more money into a hopeless business venture destroy any value that might have been available to their creditors, but they have not committed a fraudulent transfer. *See In re Universal Clearing House Co.*, 60 B.R. 985, 997-1000 (D. Utah 1986), where debtor's business was a Ponzi scheme.

The generally applicable rule is that the Bankruptcy Code protects the debtors' discretion to use their own money prior to bankruptcy. The result is that some 96% of chapter 7 bankruptcies are no-asset cases.[21] The point is not merely the empirical fact that most debtors have no non-exempt assets. Rather, the empirical fact demonstrates the pervasiveness of the general rule permitting debtors to dissipate their assets prior to filing for bankruptcy. Just about the only thing many debtors wanted to do but could not do was contribute to their church.

The dominance of no-asset cases also shows that non-tithing debtors dissipate their funds in other ways; there is no basis to believe that the creditors would get more if debtors

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[21] Michael J. Herbert & Domenic E. Pacitti, *Down and Out in Richmond, Virginia: The Distribution of Assets in Chapter 7 Bankruptcy Proceedings Closed During 1984-1987*, 22 U. Rich. L. Rev. 303, 310-11 & n.30 (1988) (reporting local and national data).

were prevented from giving to their church, and thus no basis to believe that the creditors' money somehow went to the Church or that exempting religious contributions from former §548(a)(2) would somehow force creditors to support churches. To the contrary: creditors would benefit from applying former §548(a)(2) to churches only if debtors *do* make contributions and thus enable trustees to sue solvent churches in the place of insolvent debtors. Former §548(a)(2) as interpreted in this case would make churches the principal source of funds for distribution in consumer bankruptcies. As Judge Bogue noted in dissent, this liability would be "one of the creditor's *few* protections." Pet. App. A65 (Bogue, J., dissenting) (emphasis added). But even if it had wanted to, Congress could not put the religious practice of tithing in a narrow exception to the general rule of the bankruptcy system, burdening tithing to provide an unusual protection for creditors, when it was mostly unwilling to burden secular transactions to provide more general protections for creditors.

### E. Even If New §548(a)(2) Did Not Control This Case, None of the Other Issues Would Be Ripe for This Court's Review.

As noted, there is no split in the circuits on any issue in the case. No other court of appeals has even considered the interpretation of former §548(a)(2) in the context of good faith contributions to a church or charity. No other court of appeals ever will, now that new §548(a)(2) has been enacted. No court of appeals -- not even the court below -- has considered or ever will consider the Church's free exercise attack on the Trustee's interpretation of former §548(a)(2).

Even if new §548(a)(2) did not exist, the judgment below could be defended on so many alternate grounds that

the Court could not have any confidence of reaching the issue it granted certiorari to decide.

No court anywhere has considered the meaning of new §548(a)(2). But on these facts there is no ambiguity to consider. New §548(a)(2) unambiguously controls this case, and it ensures that no other issue could be reached.

## CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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June 22, 1998

**Religious Liberty and Charitable Donation Protection Act of 1998**

An Act

To amend title 11, United States Code, to protect certain charitable contributions, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the 'Religious Liberty and Charitable Donation Protection Act of 1998'.

**SEC. 2. DEFINITIONS.**

Section 548(d) of title 11, United States Code, is amended by adding at the end the following:

"(3) In this section, the term 'charitable contribution' means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986, if that contribution--

"(A) is made by a natural person; and

"(B) consists of--

"(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986); or

"(ii) cash.

"(4) In this section, the term 'qualified religious or charitable entity or organization' means--

"(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or

"(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.".

**SEC. 3. TREATMENT OF PRE-PETITION QUALIFIED CHARITABLE CONTRIBUTIONS.**

(a) IN GENERAL-Section 548(a) of title 11, United States Code, is amended--

(1) by inserting "(1)" after "(a)";

(2) by striking "(1) made" and inserting "(A) made";

(3) by striking "(2)(A)" and inserting "(B)(i)";

(4) by striking "(B)(i)" and inserting "(ii)(I)";

(5) by striking "(ii) was" and inserting "(II) was";

(6) by striking "(iii)" and inserting "(III)"; and

(7) by adding at the end the following:

"(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which--

"(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

"(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.".

(b) TRUSTEE AS LIEN CREDITOR AND AS SUCCESSOR TO CERTAIN CREDITORS AND PURCHASERS- Section 544(b) of title 11, United States Code, is amended--

(1) by striking "(b) The trustee" and inserting "(b)(1) Except as provided in paragraph (2), the trustee"; and

(2) by adding at the end the following:

"(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.".

(c) CONFORMING AMENDMENTS- Section 546 of title 11, United States Code, is amended--

(1) in subsection (e)--

(A) by striking "548(a)(2)" and inserting "548(a)(1)(B)"; and

(B) by striking "548(a)(1)" and inserting "548(a)(1)(A)";

(2) in subsection (f)--

(A) by striking "548(a)(2)" and inserting "548(a)(1)(B)"; and

(B) by striking "548(a)(1)" and inserting "548(a)(1)(A)"; and

(3) in subsection (g)--

(A) by striking "section 548(a)(1)" each place it appears and inserting "section 548(a)(1)(A)"; and

(B) by striking "548(a)(2)" and inserting "548(a)(1)(B)".

**SEC. 4. TREATMENT OF POST-PETITION CHARITABLE CONTRIBUTIONS.**

(a) CONFIRMATION OF PLAN- Section 1325(b)(2)(A) of title 11, United States Code, is amended by inserting before the semicolon the following: ", including charitable contributions (that meet the definition of 'charitable contribution' under section 548(d)(3)) to a qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)) in an amount not to exceed 15 percent of the gross income of the debtor for the year in which the contributions are made".

(b) DISMISSAL- Section 707(b) of title 11, United States Code, is amended by adding at the end the following: "In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of 'charitable contribution' under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).".

**SEC. 5. APPLICABILITY.**

This Act and the amendments made by this Act shall apply to any case brought under an applicable provision of title 11, United States Code, that is pending or commenced on or after the date of enactment of this Act.

**SEC. 6. RULE OF CONSTRUCTION.**

Nothing in the amendments made by this Act is intended to limit the applicability of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2002bb (sic) et seq.).

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.

**United States Code Sections Amended by Religious Liberty and Charitable Donation Protection Act of 1998**

TITLE 11, UNITED STATES CODE

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CHAPTER 5--CREDITORS, THE DEBTOR, AND THE ESTATE

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SUBCHAPTER III--THE ESTATE

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**Sec. 544. Trustee as lien creditor and as successor to certain creditors and purchasers**

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~~(b) The trustee~~ *(b)(1) Except as provided in paragraph (2), the trustee* may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

*(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.*

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**Sec. 546. Limitations on avoiding powers**

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(e) Notwithstanding sections 544, 545, 547, ~~548(a)(2)~~ *548(a)(1)(B)*, and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency, that is made before the commencement of the case, except under section ~~548(a)(1)~~ *548(a)(1)(A)* of this title.

(f) Notwithstanding sections 544, 545, 547, ~~548(a)(2)~~ *548(a)(1)(B)*, and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, made by or to a repo participant, in connection with a repurchase agreement and that is made before the commencement of the case, except under section ~~548(a)(1)~~ *548(a)(1)(A)* of this title.

(g) Notwithstanding sections 544, 545, 547, ~~548(a)(2)~~ *548(a)(1)(B)* and 548(b) of this title, the trustee may not avoid a transfer under a swap agreement, made by or to a swap participant, in connection with a swap agreement and that is made before the commencement of the case, except under section ~~548(a)(1)~~ *548(a)(1)(A)* of this title.

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**Sec. 548. Fraudulent transfers and obligations**

(a) *(1)* The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

~~(1)~~ *(A)* made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

~~(2)(A)~~ *(B)(i)* received less than a reasonably equivalent value in exchange for such transfer or obligation; and

~~(B)(i)~~ *(ii)(I)* was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

~~(ii)~~ *(II)* was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

~~(iii)~~ *(III)* intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

*(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization*

*shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which--*

*(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or*

*(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.*

* * * * * * *

(d)(1)

* * * * * * *

*(3) In this section, the term "charitable contribution" means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986, if that contribution--*

*(A) is made by a natural person; and*

*(B) consists of--*

*(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986); or*

*(ii) cash.*

*(4) In this section, the term "qualified religious or charitable entity or organization" means--*

*(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or*

*(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.*

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CHAPTER 7--LIQUIDATION

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**Sec. 707. Dismissal**

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(b) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor. *In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).*

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CHAPTER 13--ADJUSTMENT OF DEBTS OF AN INDIVIDUAL WITH REGULAR INCOME

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SUBCHAPTER II--THE PLAN

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**Sec. 1325. Confirmation of plan**

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(b)(1)

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(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended--

(A) for the maintenance or support of the debtor or a dependent of the debtor, *including charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to a qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)) in an amount not to exceed 15 percent of the gross income of the debtor for the year in which the contributions are made*; and

* * * * * * *

## Uncodified Provisions of the Act

### SECTION 1. SHORT TITLE.

This Act may be cited as the "Religious Liberty and Charitable Donation Protection Act of 1998".

### SEC. 5. APPLICABILITY.

This Act and the amendments made by this Act shall apply to any case brought under an applicable provision of title 11, United States Code, that is pending or commenced on or after the date of enactment of this Act.

### SEC. 6. RULE OF CONSTRUCTION.

Nothing in the amendments made by this Act is intended to limit the applicability of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2002bb (sic) et seq.).